Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000015-001 DT 03/30/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

DARREN D SIX (001)

MICHAEL J DEW

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 14217514

Defendant Appellant Darren D. Six (Defendant) was convicted in the Phoenix Municipal Court of DUI and DUI with a BAC in excess of 0.8. Defendant contends the trial court erred in denying Defendant's Motion To Suppress/Dismiss which alleged the conduct of the officers violated his right to counsel. For the reasons stated below, the court affirms the trial court's judgment and sentence imposed.

I. FACTUAL BACKGROUND.

Defendant filed a Motion To Suppress in this matter and the trial court held a hearing on October 3, 2011.[1] At the hearing, Officer Hynes testified about the case. On direct examination, he said that on June 26, 2011, at approximately 3:00 a.m., he stopped Defendant. After he began a DUI investigation and administered FSTs, Defendant was arrested and taken to the police precinct.[2] Defendant was given a telephone book and 20 minutes in which to try to contact an attorney.[3] Officer Hynes did not know if Defendant attempted to contact Defendant's aunt—who was a police officer for the Salt River Indian Reservation—but Defendant was asked if he would like to call her or anyone.[4] After an approximate 20-minute time period, the police asked Defendant if he would consent to a blood draw or if they would need to get a warrant.[5] By that

[1] Hearing transcript, October 3, 2011, hearing on Motion To Suppress.
[2] *Id*. at p. 4, ll. 4–8.
[3] *Id*. at p. 4, ll. 11–15.
[4] *Id*. at p. 4, ll. 19–20.
[5] *Id*. at p. 5, ll. 5–7.

time, the police were coming to the end of the two-hour window within which blood is supposed to be drawn.[6] The police obtained a search warrant and drew a blood sample.

Defendant's attorney cross-examined Officer Hynes about Defendant's request for counsel. The officer initially stated Defendant did not ask to speak with an attorney. Instead, when queried, Defendant replied "I don't know" and kept repeating this response.[7] After being shown his report, Officer Hynes changed his testimony to reflect he explained the implied consent rule to Defendant and Defendant requested to have a lawyer present.[8] Defendant was then given a telephone book and 20 minutes with the phone book in which to contact counsel and/or his aunt.[9] After an approximate total of 30 minutes, Defendant was told that any further delay would be considered a refusal to take the blood test.[10] Defendant began to cry and say he did not know what to do.[11] Defendant's blood was drawn at 4:53 a.m., approximately one hour and 20 minutes after he received the implied consent explanation.[12]

The trial court denied Defendant's motion for two reasons: (1) Defendant's blood was drawn pursuant to a search warrant and there is no right to counsel before submitting to a search warrant and (2) the trial court determined Defendant was afforded the right to contact an attorney but could not come to a decision as to what he wanted to do.

Defendant filed a timely appeal and the State filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO SUPPRESS.

In reviewing a trial court's ruling on a motion to suppress, an appellate court defers to the trial court's factual determinations but reviews de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). This Court views the evidence presented at the suppression hearing in the light most favorable to sustaining the trial court's determination. In this case, the trial court determined Defendant failed to demonstrate the State violated his right to counsel. This Court concurs.

Defendant argues he was denied his right to counsel because he was only afforded 20 minutes to locate an attorney and the amount of time was not sufficient for him to contact his aunt—a tribal police officer—for assistance (in finding an attorney). Defendant relies on Rule 6.1(a) Ariz. R. Crim. P. which provides in part as follows:

[6] *Id*. at p. 5, ll. 1–4.
[7] *Id*. at p. 6, ll. 16–20.
[8] *Id*. at p. 7, ll. 10–25; p. 8, ll. 1–6.
[9] *Id*. at p. 8, ll. 13–19.
[10] *Id*. at p. 8, ll. 2—23.
[11] *Id*. at p. 9, ll. 3–4.
[12] *Id*. at p. 10, ll. 1–8.

> A defendant shall be entitled to be represented by counsel in any criminal proceeding . . . . The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefore.

In *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 ¶¶ 68–69 (2004) the Arizona Supreme Court explained Rule 6.1(a) in the context of a DUI setting and—after explaining the line of DUI cases—stated the denial of counsel may deprive a defendant of the opportunity to obtain exculpatory evidence in a DUI context. In *McNutt v. Superior Court*, 133 Ariz. 7, 10, 648 P.2d 122, 125 (1982) the Arizona Supreme Court established that a defendant has the right to confer with counsel before providing non-testimonial physical evidence of intoxication. The Supreme Court also determined "it is crucial for both the state and the defendant to gather evidence relevant to intoxication close in time to when a defendant allegedly committed the crime. Otherwise, any alcohol that may have been in the blood will have decomposed before the blood can be tested." *McNutt, id.*, 133 Ariz. at 10, n.2, 648 P.2d at 125, n.2. *Accord*, *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996) where the Court of Appeals determined due process violations occurred where police conduct interfered with a defendant's right to gather evidence of sobriety before the evidence dissipated. The Court of Appeals similarly commented on the destructibility of blood evidence in *State v. Rosengren, id.*, 199 Ariz. 112, 117, 14 P.3d, 303, 308 ¶¶ 9–11 (Ct. App. 2000) where it said "[A] DUI suspect has a qualified due process right to gather independent evidence of sobriety while it still exists, so long as exercise of that right does not unduly delay or interfere with the law enforcement investigation." These cases lead to the conclusion that when a DUI suspect requests counsel before providing physical evidence of intoxication and the police fail to provide a reasonable opportunity to contact counsel, Rule 6.1(a) has been violated where it prevents the Defendant from obtaining exculpatory evidence. That is not the situation in the present case.

This rationale does not apply in the current situation because (1) Defendant did not take advantage of his opportunity to contact counsel before the blood draw; (2) did not specifically express a desire for a longer time period in which to contact counsel; (3) did not assert he was precluded from obtaining exculpatory evidence; and (4) had his blood drawn pursuant to a search warrant. Police conduct did not interfere with his right to contact counsel. Instead, his inability to determine his own course of action interfered with his rights. Defendant limited his "requests" to crying and stating he did not know what to do. This is not the same as requesting counsel. Additionally, Defendant is trying to engraft an obligation on the police to take the initiative and assist him in locating counsel. He provides no authority indicating the police owe him any such duty. Defendant failed to demonstrate the 20 minute window he requested was insufficient time for him to locate counsel.

While defendants are entitled to contact counsel in the context of a DUI setting, the right is not invoked merely because the State seeks a blood draw. In *Schmerber v. California*, 384 U.S.

757, 767–66 (1966) the U.S. Supreme Court ruled there is no absolute right to counsel to advise whether to take a blood test.

> This conclusion [that drawing and testing a suspect's blood does not violate the privilege against self-incrimination] also answers petitioner's claim that, in compelling him to submit to the [blood] test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege [against self-incrimination], he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is present. The limited claim thus made must be rejected.

Schmerber, id., allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test.

As stated by the trial court, Defendant's blood was not drawn because he consented to a blood draw. It was drawn pursuant to a search warrant. In *State v. Stanley*, 217 Ariz. 253, 172 P.3d 848 (Ct. App. 2007) our Court of Appeals addressed the issue of whether police could request a search warrant in the absences of a specific refusal to give consent to a blood draw. In *Stanley, id.,* the police requested a search warrant while the defendant was speaking with her attorney. Ms. Stanley asserted the police erred in seeking the warrant because she had not specifically refused to take the blood test. In ruling, the Arizona Court of Appeals stated:

> However, when, as here, there is no refusal yet still no consent to the test, there is nothing in § 28–1321 that precludes the issuance of a search warrant.

State v. Stanley, id., 217 Ariz. at 258, 172 P.3d at 853, ¶ 23. The Court then continued and held:

> Our construction of the statute permits the police to obtain a search warrant at any time after a suspect has been requested to submit to a test and has failed to unequivocally consent. This includes time while a suspect exercises the right to consult an attorney.

Id., at ¶ 25.

Because Defendant (1) had no due process right or right to have counsel before complying with a search warrant; (2) was afforded the opportunity to locate counsel; and (3) did not specifically request additional time to locate counsel, this Court concludes—based on this Court's review of the record—that the trial court did not err in denying Defendant's motion to suppress

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III. CONCLUSION.

Based on the foregoing, this Court concludes the Phoenix Municipal Court did not err when it denied Defendant's Motion to Suppress.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 033020120945